Nos. 82-1349 and 82-1350

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

S. A. EMPRESA DE VIACAO AEREA RIO GRANDENSE (VARIG AIRLINES)

UNITED STATES OF AMERICA, PETITIONER

v.

EMMA ROSA MASCHER, ET AL.

UNITED STATES OF AMERICA, PETITIONER

v.

UNITED SCOTTISH INSURANCE CO., ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1a. Relying upon a handful of statements by FAA employees and irrelevant materials from one of the FAA's certification manuals, respondents (Mascher

Br. 13-23; Varig Br. 10-16; United Scottish Insurance Br. 24) argue that the FAA's role in the inspection and certification process is to check every part in every aircraft that is certified and thereby, in effect, to warrant that each aircraft complies with the minimum safety standards the FAA promulgates by regulation. There is nothing, however, in the FAA's statute, regulations or manuals that indicates that the agency's role is anything other than that of a "policeman" of the industry; the FAA's regulatory process places the responsibility for assuring that each aircraft meets minimum standards on the manufacturer or operator of the aircraft.[1] Thus, 49 U.S.C. 1425(a) requires that every person "operating, inspecting, maintaining, or overhauling equipment" used in air transportation must observe and comply with the Secretary's safety standards. Similarly, 14 C.F.R. 21.33(b)(1) obligates the applicant for a certificate to "make all inspections and tests necessary to determine * * * [c]ompliance" with the FAA's safety standards. Finally, the agency's operating manual has *always* stated that "[i]t is the primary responsibility of manufacturing inspectors to determine that prototype products * * * conform with" safety requirements. Civil Aeronautics Admin., U.S. Department of Commerce, *Manual of Procedure—Flight*

[1] Respondent Varig asserts (Varig Br. 9) that we have introduced a new issue by describing how the FAA conducts its business, as reflected in the statute, regulations and internal operating manuals. But these cases turn directly on the nature of the agency's statutory responsibilities. Respondent Varig also cannot complain about our reliance on the FAA's operating manuals. It admits (Varig Br. 9 n.9) that it obtained a copy of at least one operating manual through discovery. More importantly, these are public documents that describe how the agency conducts its business.

Operations and Airworthiness, Ch. 201, "Type Certification" 11-1 (rev. 1957).[2] In turn, the FAA is merely empowered to make safety inspections and to

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[2] Respondent Varig points out (Varig Br. 9-10) that the specific manuals upon which we relied in our opening brief did not exist at the time of the certifications in the *Varig* case. But the manual Varig has lodged with the Court contains the identical provisions.

The differences in the provisions cited by Varig and those cited in our opening brief do not reflect differences in the manuals, but rather reflect differences in our respective views regarding which provisions are applicable to these cases. Respondent Varig *alone* characterizes its case as involving *only* "type certification" and asserts that the FAA has undertaken absolutely to review all safety standards at the design stage of the certification process. The Mascher respondents do not similarly limit their claims. Indeed, this is the first time Varig has so cabined its analysis. Its complaint includes allegations of negligence in inspections at all phases of the certification process (J.A. 17, 19-20) and its brief in opposition to the government's motion for summary judgment was not limited to type certification.

The problem with Varig's attempt now to limit its case to design certification is that there is nothing that indicates that the design of the Boeing 707 was defective. All of the evidence cited by Varig involves the actual lavatory waste container in a sister airplane owned by Varig. Not one witness for respondents testified that he had ever looked at the design of the airplane or that it failed to comply with FAA standards. In any event, Varig acknowledges (Varig Br. 12) that, even at the design certification stage, the FAA inspectors need not check all data from the applicant, and a cursory glance at the fire prevention portion of the FAA's *Manual of Procedure*, *supra*, at 28-32, shows that it is referring to the standards relating to the design of the power plant, intake systems and exhaust systems that are likely to ignite during the operation of the aircraft.

ground any aircraft that is not in condition for safe operation. 49 U.S.C. 1425(b).

Thus, the official materials that define how the agency regulates the aircraft industry indicate that the FAA's role is one of law enforcement. As we explained in our opening brief (U.S. Br. 4-9), when the FAA conducts an inspection for an initial or supplemental type certificate, it does not purport to check every part of the aircraft or modification.[3] Rather, the agency's power to inspect, like many other kinds of law enforcement authority, is designed to have an *in terrorem* effect—to spur manufacturers and operators to comply fully with the FAA's safety standards, knowing that the agency possesses the authority to scrutinize every aspect of every aircraft for itself. General statements by individual employees in depositions—made in response to vague questions—suggesting that the FAA ideally endeavors to make sure that every safety requirement is satisfied cannot alter the agency's basic regulatory role as set out in its statutes and regulations. Cf. *Schweiker* v. *Hansen*, 450 U.S. 785 (1981).

b. Because the FAA performs a regulatory enforcement function, its role is limited to ensuring that other persons, with direct operational responsibilities, conform to established safety standards. Thus, con-

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[3] Varig relies (Varig Br. 16) on a blank checklist for its assertion that the lavatory waste receptacle was not inspected prior to issuance of the type or airworthiness certificates. But that checklist was produced by Boeing as merely a sample checklist used by FAA employees. There is no evidence that this blank checklist was used for the inspection of the Boeing 707 in 1958.

trary to respondents' claim (Varig Br. 24; Mascher Br. 23), this case is plainly distinguishable from cases in which the federal government assumed direct operational responsibility and, as a result, was held liable for negligent performance of those operations under the Tort Claims Act.

Respondents nonetheless assert that the oversight responsibilities of the FAA cannot be distinguished from the failure of the federal prison officials in *United States* v. *Muniz*, 374 U.S. 150 (1963), to "supervise" inmates. But the "supervision" in *Muniz* was still part of the operation of the federal prison; the United States had the *sole* responsibility to protect inmates in its prison. A proper analogy to this case would be a suit for damages brought by an injured *state* prisoner, claiming that the United States undertook the responsibility to certify state-operated prisons but failed to discover some deficiency in how state officials supervised their prisoners. *Muniz* in no way suggests that liability would extend to the United States in such a regulatory context.[4]

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[4] Nor does the fact that this Court upheld liability against the United States for negligence by air traffic controllers, *Eastern Air Lines, Inc.* v. *Union Trust Co.*, 221 F.2d 62 (D.C. Cir.), aff'd, 350 U.S. 907 (1955), require holding the government liable for claims arising out of the FAA's inspection and certification function. The court of appeals in *Zabala Clemente* v. *United States*, 567 F.2d 1140, 1147-1148 (1st Cir. 1977), cert. denied, 435 U.S. 1006 (1978), correctly distinguished air traffic control from the FAA's regulatory activities:

> [W]hile we can understand how one could generalize from the air controller's duties to the responsibilities of FAA inspectors, both history and policy establish that

Respondents assert (Varig Br. 25; Mascher Br. 6-7) that our attempt to withdraw the government's inspection and certification process from the ambit of the Tort Claims Act is textually unsupported and therefore represents an attempt to imply an exception into the Act. However, respondents ignore the teaching of this Court's decision in *Feres* v. *United States*, 340 U.S. 135 (1950), which held that the "private person" limitation in 28 U.S.C. 1346(b) excludes liability for certain "governmental functions."

The District of Columbia Circuit recently recognized this precise point in *Jayvee Brand, Inc.* v. *United States*, No. 82-1167 (Nov. 15, 1983), slip op. 8, in stating that "[o]ne plausible reading of [Section 1346(b)] is that there remains some distinction between private and governmental action so that not all wrongful acts by the government subject it to tort

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the differences between the two are extensive and require different legal consequences. * * *

* * * * *

Tort liability is intrinsic in the [air traffic controller] function; once the government took control of the air towers it became subject to the duties that would devolve on any entity that took on such responsibility. There is no comparable duty related to the role of FAA inspector.

Moreover, in the air traffic controller situation and the other cases cited by respondents involving direct operations by the federal government, if the United States were not liable under the Tort Claims Act "the entire burden [would] fall[] on the injured party * * *." *Rayonier, Inc.* v. *United States*, 352 U.S. 315, 320 (1957). By contrast, in cases involving a government agency's alleged failure adequately to regulate the conduct of private persons, the injured party may recover damages from the private persons—the true tortfeasors—as respondents did here. See U.S. Br. 11 n.11, 15 n.16.

liability." The court went on to reason that "quasi-adjudicative" action by an agency, which is comparable to how the FAA's certification process has been characterized (U.S. Br. 41 n. 37), "is action of the type that private persons could not engage in and hence could not be liable for under local law." *Jayvee Brand, Inc.*, slip op. at 9. Thus, our submission that the FAA's certification function is not a proper basis for liability under the Act is readily supported by the language of and congressional intent underlying the "private person" limitation in Section 1346(b) and does not require the Court to "imply" any new exception into the Act.[5]

2. In arguing (Varig Br. 29-37; Mascher Br. 10-23; United Scottish Br. 19-25) that the government is liable as a good samaritan for negligence in performing its certification function, respondents ignore the basis for the holding of the court of appeals and disregard the inherent limitations on the doctrine as set out in the Restatement (Second) of Torts. The court of appeals held that good samaritan liability was appropriate here solely on the ground that respondents relied generally on the FAA's regulatory activities. See 82-1349 Pet. App. 5a; 82-1350 Pet. App. 4a; Restatement (Second) of Torts §§ 323(b) and 324A(c) (1965). The court of appeals did not disturb the district court's finding that the FAA had not increased the risk of injury to respondents (*id.* at

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[5] Respondent Varig asserts (Varig Br. 26 n.19) that the statement by Representative Gwynne during the 76th Congress (U.S. Br. 22) that the Act did not extend to suits based on governmental functions was "referring to the discretionary function exception to the Act." Respondent's claim is plainly incorrect since the discretionary function exception was not included as part of a Tort Claims Act proposal until the 77th Congress. See U.S. Br. 40.

§§ 323(a) and 324A(a)) and the court of appeals found no need even to mention Section 324A(b), which imposes liability if the good samaritan undertakes to perform the duty of the primary actor. 82-1350 Pet. App. 2a, 14a. As we explained in our opening brief (U.S. Br. 8, 33, 34), the manufacturer or operator retains the duty to inspect the aircraft and guarantee that it is safe; the FAA plainly does not undertake to substitute in the performance of that duty.[6]

Respondents United Scottish (Br. 22-23), attempting to avoid having to prove specific reliance as required by Section 324A(c), claim that the FAA increased its risk of injury. Respondents' theory seems to be that since the FAA's failure to disclose the defect in or to deny certification of the DeHavilland Dove aircraft could be characterized as the "but for" cause of the accident, the FAA increased the risk of injury. But if all that were required to satisfy Section 324A(a) was a showing of "but for" causation, there would be no reason to have subsections (b) and (c). At a minimum, liability predicated on a claim that the good samaritan increased the risk of harm requires proof of some affirmative act that added peril to the plaintiff's situation. See Restatement (Second) of Torts, *supra*, at 143.[7]

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[6] Even more clearly irrelevant are cases relied upon by United Scottish (Br. 18-19) that have held private persons liable for violating the FAA's regulations. The court below in its first decision rejected the argument that the United States could be held liable under a negligence per se theory (614 F.2d 188, 193) and United Scottish never challenged that ruling.

[7] Compare *Arney* v. *United States*, 479 F.2d 653 (9th Cir. 1973), in which the government inspector insisted on a modification to the fuel line that was the proximate cause of the

Respondents Mascher and United Scottish (Mascher Br. 13-23; United Scottish Br. 24-25) argue that their reliance on the FAA's inspection and certification process was reasonable because the FAA has represented in various contexts that the airplanes it certifies are safe. Initially, we note that virtually all of the public statements cited by respondents postdate the accidents in these cases. Moreover, as we indicated in our opening brief (U.S. Br. 34-35), the reliance required by the good samaritan doctrine is not the general knowledge that a government agency exists or even that it performs a safety related function, but rather that because of the FAA's actions the injured party has foregone alternative safety precautions. Respondents do not and could not make any such claim in their briefs.

Similarly, respondent Varig relies heavily (Br. 31, 34) on the illustrations to Section 324A of the Restatement.[8] What Varig overlooks is that examples 2 and 3, which involve private inspectors, illustrate liability under Section 324A(b)—when the good samaritan undertakes to perform the duty owed by another. This was not the basis for liability adopted by the court of appeals and could not be a proper basis for liability under the facts of these cases. Moreover,

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accident. Here, there is no evidence that any action of the FAA rendered the aircraft more dangerous than it was as constructed or modified by the manufacturer or installer. Compare *Hylin* v. *United States*, 715 F.2d 1206, 1210-1213 (7th Cir. 1983).

[8] Respondent United Scottish (Br. 16) persists in its contention that the FAA has "preempt[ed] the field" of airline safety. This contention utterly ignores the continuing duty of manufacturers and operators to inspect their aircraft for compliance with all safety requirements.

Varig's entire analysis of the good samaritan doctrine reflects a basic misunderstanding of the role of the traditional good samaritan. Liability under that doctrine arises from the fact that the good samaritan takes over responsibility for the protection of third persons, and thereby engenders immediate reliance. Thus, in a typical case such as the elevator example relied upon by Varig (Br. 31), the building owner, if sued, could implead the elevator inspector, who would be fully liable for the failure to inspect because of his contractual assumption of that duty. By contrast, if an injured party were to sue an airplane manufacturer such as Boeing, there would be no basis for the manufacturer to implead the United States, because the manufacturer in no way relies upon the United States to satisfy its duty to inspect the product it sells.

Respondent Varig (Br. 32) responds to our claim that no liability is proper under the Restatement because respondents are too far removed from the certification process by arguing that we have cited no cases supporting such a limitation. But limitations on liability based on the remoteness of the relationship between the parties is a pervasive concept in tort law, see W. Prosser, *Handbook of the Law of Torts* 324 (4th ed. 1971), and it is respondents' obligation under 28 U.S.C. 1346(b) to demonstrate that state law would hold a private person liable for conduct like that engaged in by the federal government. Their failure to show that any state court has ever held anyone liable as a good samaritan for conduct even remotely comparable to these cases compels dismissal of their suits under Section 1346(b).[9]

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[9] Respondent Varig repeatedly asserts (Varig Br. 13-16, 17) that its employee, Ritter, relied on the FAA's inspections,

3. In arguing that the discretionary function exception does not apply here, respondents take an unduly narrow view of the FAA's certification activities. The issuance of an airworthiness certificate is not the simple "mechanical, operational task" described by respondents (see Varig Br. 41). The FAA has issued numerous regulations to help make aircraft safer, but the issuance of these regulations has not lessened the governmental-regulatory decision that the FAA must make each time an applicant seeks a certificate. In addition, as we explained in our opening brief (U.S. Br. 42-46), the FAA must make a variety of discretionary judgments in determining how to enforce the applicable regulations. First, it must decide which parts of the airplane it will inspect and which it will rely upon the designated engineering representatives of the manufacturer to inspect.[10]

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but *not* on the FAA's airworthiness certificate. Initially, this argument is inadequate to satisfy the good samaritan doctrine; respondent must show that the reliance was reasonable. Ritter's reliance was totally unfounded since he assumed that the "U.S. FAA physically inspects *that* aircraft * * * before issuing the individual aircraft an 'airworthiness certificate'" (Varig Br. 18; emphasis added). Varig does not dispute our claim (U.S. Br. 8) that the FAA itself inspects virtually no finished aircraft as they come off the assembly line at the manufacturer's plant. Thus, Ritter's reliance was based on a complete misconception of the specific activities of the FAA. Moreover, no purchaser of an aircraft would fail to require the seller to produce an FAA certificate. Thus, it is hardly credible that there was reliance on the FAA's inspection but no reliance on the certificate.

[10] Relying upon the 1957 manual, respondents assert (Varig Br. 42 n.36) that the United States is liable for the negligence of designated engineering representatives who are hired by the manufacturer to conduct inspections. The statement in the manual that DER's are federal employees is plainly incorrect today; this Court's decision in *United States* v. *Orleans*,

Second, the FAA must decide whether the airplane at its various stages complies with the general safety standards. Obviously, any discretionary function can be disaggregated so that a particular decision or non-decision made as part of the regulatory process appears to lose its character as a discretionary function; no doubt some of the actions undertaken by the government in inspecting and handling the fertilizer in *Dalehite* v. *United States*, 346 U.S. 15 (1953), if viewed in isolation, could be characterized in some sense as operational. But this Court rejected that reasoning and held that the entire process was itself a discretionary function. 346 U.S. at 36. Similarly, here, the entire certification process is regulatory and judgmental in nature and therefore not a proper basis for liability under 28 U.S.C. 2680(a).[11]

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425 U.S. 807 (1976), makes clear that the United States is not liable for acts of negligence by such independent contractors.

[11] Respondent Varig makes a plain meaning argument (Varig Br. 39-40) that Section 2680(a) does not immunize any allegedly negligent governmental action that is undertaken pursuant to a valid regulation. This argument involves, however, a plain misreading of the provision. The first clause of Section 2680(a) is intended to preclude liability based on allegations that an agency regulation or statute is itself invalid or unconstitutional. *Dalehite* v. *United States*, *supra*, 346 U.S. at 27, quoting *Tort Claims: Hearings on H.R. 5373 and H.R. 6463 Before the House Comm. on the Judiciary*, 77th Cong., 2d Sess. 6, 25, 29, 33 (1942) (remarks of Assistant Attorney General Shea). The reference to the "exercise of due care" obviously means action that is faithful to the command of the allegedly ultra vires regulation or statute. The second clause of Section 2680(a) more broadly immunizes any discretionary action, whether undertaken pursuant to a valid regulation or not. This is precisely how the Court interpreted the second clause in *Dalehite*: "[w]here there is room for policy judg-

4. Respondents rely (Varig Br. 47-50; Mascher Br. 23; United Scottish Br. 30-32) almost entirely on *Block* v. *Neal*, No. 81-1494 (Mar. 7, 1983), for their argument that the misrepresentation exception in 28 U.S.C. 2680(h) does not apply to their claims. Respondents are simply wrong in asserting that the supervisory activity in *Neal* was not crucial to that decision. The Court repeatedly emphasized the allegation in the complaint that the Farmers Home Administration breached its duty to supervise construction of Neal's house. Slip op. 8, 9. The FAA does not undertake to supervise construction as part of its certification process, nor do respondents contend that it does.

That respondents' claims are classic examples of claims for misrepresentation is illustrated by comparing these cases with the example in the Restatement of Torts § 311 (1934), quoted at page 47 of our opening brief. In the illustration, the inspector certified the product; the product was used by its owner; and a third party was injured. The suit by the third party is for negligent misrepresentation, and it makes no difference whether the injured party personally read the certificate or not (compare Varig Br. 49). Respondents' claims are indistinguishable from those in the Restatement; indeed, respondents make no at-

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ment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable." 346 U.S. at 36. Since there was no question that the government's regulatory program in *Dalehite* was a valid governmental function, it necessarily follows that allegedly negligent conduct undertaken pursuant to a regulation can still fall within the ambit of the second prong of Section 2680(a).

tempt to distinguish them. Accordingly, the misrepresentation exception in Section 2680(h) bars these suits because they arise out of misrepresentation as that tort was understood in 1946 when Congress passed the Tort Claims Act. See *United States* v. *Neustadt*, 366 U.S. 696 (1961).

CONCLUSION

For the foregoing reasons, and the reasons stated in our opening brief, the judgments of the court of appeals should be reversed.

Respectfully submitted.

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